THE APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO COMPULSORY STATEMENTS OUT OF COURT. — In a recent New York case a statute requiring an operator of an automobile, who does damage to persons or property, to report to the police his name, address, and license number and the fact of the injury,[1] was held unconstitutional as violating the provision that no one shall "be compelled in any criminal case to be a witness against himself." *People* v. *Rosenheimer*, 44 N. Y. L. J. 1629 (Ct. Gen. Sess., N. Y. County, Jan. 1911).

The scope of such constitutional provisions as the above which, with varying language, exist in nearly every state, must be taken as neither greater nor less than that of the common-law privilege against self-incrimination.[2] Thus interpreted, the constitutional protection extends at least to every form of judicial proceeding. Thus it has been applied to proceedings before grand juries,[3] to examinations before legislative investigating committees,[4] and to civil cases.[5] If the question is one the answer to which may incriminate, the nature of the tribunal in which it is asked is immaterial. It has been said, however, that "the privilege covers only statements made in court under process as a witness." [6] But it may well be doubted whether it is so limited. It would seem, for example, that a statute requiring a man in the position of the defendant in the principal case to describe the particulars of the occurrence would violate the purpose of the privilege.

Assuming, then, that the privilege may extend to proceedings out of court, is it infringed by the provisions of this statute? Statutes requiring druggists in prohibition districts to make public records or weekly sworn statements of their sales of liquor, and the purposes thereof, have been upheld; and these records used in prosecutions for illegal sales.[7] The privilege is not to be so extended as to nullify any requirement that a man do an act which may by possibility incriminate him.[8] And there seems to be no bright line between requirements which do not and those which do violate the privilege. It must be purely a question of degree. On principle, however, it would seem that the test should be whether a primary object or effect of the requirement is to secure evidence for a criminal prosecution. The primary object and effect of the liquor

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[1] The full wording of the statutory provision is as follows: "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of said operator or to accident, leaves the place of said injury or accident without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station or judicial officer, shall be guilty of a felony." N. Y. LAWS OF 1910, ch. 374, sec. 290, subdiv. 3.

[2] See Counselman *v.* Hitchcock, 142 U. S. 547, 584; 3 WIGMORE, EVIDENCE, § 2252.

[3] Counselman *v.* Hitchcock, *supra;* People *v.* Argo, 237 Ill. 173.

[4] Emery's Case, 107 Mass. 172.

[5] Wilkins *v.* Malone, 14 Ind. 153; *Ex parte* Senior, 37 Fla. 1; Kellogg *v.* Sowerby, 32 N. Y. Misc. 327.

[6] 3 WIGMORE, EVIDENCE, § 2266.

[7] State *v.* Henwood, 123 Mich. 317; State *v.* Davis, 69 S. E. 639 (W. Va.); State *ex rel.* McClory *v.* Donovan, 10 N. D. 203; State *v.* Davis, 108 Mo. 666.

[8] In addition to the liquor license cases, *supra*, a statute requiring operators of automobiles to display their license numbers in plain sight has been upheld. People *v.* Schneider, 139 Mich. 673.

statutes mentioned above seems to be to regulate sales of liquor, and to prevent, rather than to detect, abuses of the druggist's license. The fact that an incidental result may be to obtain evidence of illegal sales does not make the statute void. On the other hand, a statute, compelling an examination of brokers' books with a view to ascertaining whether or not taxes had been paid, was, it would seem properly, held unconstitutional.[9] And so in the principal case, a primary effect, if not a primary object, of the requirement is to compel the acknowledgment of facts which are likely to be the basis of a prosecution. While courts should guard against extending the privilege against self-incrimination, they are bound to recognize its existence, and it would seem that the statute in question was properly held unconstitutional.

It has been suggested that when the defendant takes out his license, he voluntarily assumes the obligation to give this information.[10] This argument can of course only apply where the license is obtained after the passage of the statute. And, even then, it is a mooted question how far the obtaining of licenses may be conditioned upon waiver of constitutional rights. Decisions as to the validity of conditions imposed by states upon foreign corporations seeking to do intrastate business furnish an interesting analogy.[11]

STATUTORY RESTRICTIONS ON WARRANTIES IN INSURANCE POLICIES. — In several of our states, statutes have been enacted, which limit the effect of untrue statements made in negotiating an insurance policy. These statutes provide that no policy shall be voided by a false representation, unless it be material to the risk or wilfully false.[1] Their purpose is to restrict the right of an insurance company to make the validity of the contract dependent upon the accuracy of answers to numerous frivolous questions.[2] Being remedial in their nature, the courts have construed them so as to apply as well to warranties as to collateral representations.[3]

It has also been asserted by way of *dictum*, that these statutes have abolished the common-law distinction between representations and

[9] People *ex rel.* Ferguson *v.* Reardon, 197 N. Y. 236. But see a criticism of this case in 21 HARV. L. REV. 621.

[10] See State *v.* Davis, 108 Mo. 666, 670. The holding of the case seems, however, correct.

[11] These decisions relate mainly to conditions that the foreign corporation shall not remove its actions to the federal courts. The state may take away the privilege of doing intrastate business for breach of this condition. Doyle *v.* Continental Ins. Co., 94 U. S. 535; Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246. But an agreement not to remove, exacted as a condition precedent to doing such business, is void. Insurance Co. *v.* Morse, 20 Wall. (U. S.) 445; Barron *v.* Burnside, 121 U. S. 186. See 23 HARV. L. REV. 549.

[1] A typical statute is that of Pennsylvania: "No misrepresentation or untrue statement made in an application, made in good faith, shall effect a forfeiture or be a ground of defense, unless such misrepresentation or untrue statement relate to some matter material to the risk." PURD. DIG. 1953, § 66.

[2] Anderson *v.* Fitzgerald, 4 H. L. Cas. 484; Jeffries *v.* Life Ins. Co., 22 Wall. (U. S.) 47 (untrue statement that insured was single).

[3] White *v.* Conn. Mut. Life Ins. Co., Fed. Cas. No. 17,545; White *v.* Provident Savings Life Assur. Soc., 163 Mass. 108. The statute does not apply to promissory warranties. Gross *v.* Colonial Assur. Co., 121 S. W. 517 (Tex. Civ. App.).